

LEGAL ENTITY/ INSTITUTIONAL NAZHIR AND THE CONCEPT OF MASLAHAH IN INDONESIAN WAQF REGULATION

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Abstract: *The main purpose of Islamic law is to reach benefit (maslahah). This principle is dominantly put forward in the process of forming and applying Islamic law, as affirmed in the Qur'an and Sunnah. Maslahah is a synonym of the word 'benefit' and the opposite of the word 'mafsadah' (damage). The process of establishing Waqf law in Indonesia, the principle of Maslahah is prioritized mainly in the provisions stated that waqf regulation not only about Individual Nazhir, which is usually seen in 'ahli' or 'dzurri' Waqf, but also states that a Legal Entity/ institutional can become a Nazir waqf in managing the assets. The concept of Waqf in the perspective of Imam Syafi'i confirms that the pillars of waqf consist of: Wakif (the people), Mauquf 'alaihi, mauquf bihi, and Wakaf pledge (statements). Meanwhile, the concept of Nazhir waqf developed in Indonesia nowadays is through the regulation in Law Number 41 of 2004 and Government Regulation No. 28 of 1977 about owned land waqf. In the practice of administering and managing waqf property, Islam outlines that the community, especially Muslims, must have experience and capacity so that the ummah (society) is able to fulfill their needs. Nazhir ability in having productive thinking and applying modern management of waqf assets is needed in order to realize a tangible contribution in ensuring the sustainability of the social interests of the community. The issue of social interests of the general public is very synonymous with the joints listed in Maqashid Syariah, namely maintaining Religion, Maintaining the Soul, Maintaining Intellect, Maintaining Descendants, and Maintaining Property. This paper confirms that the establishment of the Legal Entity/Institution Nazhir in the Waqf Regulation is the Indonesian Fiqh which is reflected to the usage value. Then, as the embodiment of the explanation of the provisions in sharia that are global in nature (mujmal).*

Keywords: Nazhir Legal Entity, Maslahah, Waqf Regulation, Indonesia

Introduction

Coulson (1969) states that the one of the most popular ways of tying up property in Conservative Islam was by a settlement under the waqf system. The essence of a waqf lies in the relinquishment by the founder of the ownership of the property which is the subject of the settlement. The property henceforth belongs in perpetuity only to Allah and therefore cannot be transferred by any form of alienation. Therefore institution of waqf often used to established a family settlement, the income being enjoyed by the founder's children or other relatives, generation after generation (p.88).

Two "holy cities", also known as "Al Haramain", are institutions of Waqf that illustrate how the spirit of Muslims in developing waqf for the welfare of these two cities residents. Hoexter underlined how the relationship between *al-Haramain* and the environment around the Arabian Peninsula. Contributions to the poor in Mecca and Medina are a source of pride for Islam and form of Islam existence in the presence of state authorities (Thielmann, 2001, p.1). At the time of the Al Mamluk in Egypt, which received appreciation from Ibn Bathutah (1304-1377 AD) and Ibn Khaldun (1332-1406 AD), where the education system and the construction of public libraries increased rapidly, which was caused by the role of waqf. Meanwhile, at this time also known as waqf 'servant' person who was represented to care for religious institutions, Waqf to help the needy and poor, also included waqf for the facilities in Haramain, Mecca and Medina. Waqf for Haramain was first carried out by King Shaleh bin al-Nasir who bought the village of Bisus and was represented to finance the kiswah (cloth) of the Ka'bah each year and replace the cloth of the Prophet Muhammad's grave and its pulpit every five years.

According to Sanrego (2018), Islam has incorporated a social self-help preparation into the structure of its pillars by giving contribution based on their individual abilities to fulfill their brotherly vision. So that everyone enjoys his/her dignity as a human beings and his/her brother's attention as one of the members of the ummah. while Islam requires every Muslim to fulfill their needs, Islam also establishes a collective obligation for Muslim communities to meet the needs of all those who could not help themselves because of disabilities that are beyond their control. If all of these obligations have been fulfilled, but there is still poverty coupled with wealth, the community is not worthy of being seen as a true Muslim community (p. 179). As the Messenger of Allah. said:

"It is not a true Muslim, those whose stomachs are full while their neighbors are starving".

In the Prophet's Hadith narrated by Imam Muslim (An-Naisabuuri, tth), namely:"From Abu Hurairah ra, Rasulullah saw. said: 'When a human dies. Disconnected from his charity except three things (ie): from alms fingers, useful knowledge, or pious children who pray for them. "(Muslim history, no. 1631)

Furthermore, Sanrego (2018) stated that to ensure or guarantee the sustainability of a community for both micro and macro level (in the context of the country) - which is safe and harmonious, Islam makes social guarantee (at-takaful al-Ijtima'i) by having several financial instruments mentioned above. Indeed, this could have a positive impact on the country's economy as well as monetary stability. Besides the role of the government, desire of the community to jointly create social collateral system will naturally be reached when the concept of ukhuwwah is properly understood by every Muslim (p. 212).

As stated by Mulla & Alam (2013), cash waqf for example; by having cash waqf collected from the community as wakif (provision of waqf funds), the government can become Nazir (waqf fund managers) who can use the waqf funds for government projects that are low risk and bring significant benefits (usually infrastructure projects for the public importance).

Regarding to the formulation of the ideals of Indonesian Law as stated in the Preamble of the 1945 Constitution which is strongly attached to the term of social justice for all Indonesian people, symbolized by rice and cotton, both the version of Bung Karno and Muhammad Yamin, referred to "welfare the people or welfare only, not referred to " social welfare "or with the words" social justice for all the people of Indonesia ". The term welfare and social welfare certainly differ in their content, so the understanding of the state welfare must also be understood differently from the social welfare state (J. Asshiddieqy, 2016).

Since the beginning before Indonesian independence, the practice and tradition of waqf has been developed and continues to grow until now, the number of waqf increased from 7 waqf and continued to increase on 1751-1800 to 61 locations of waqf. The next, it has been developed in the 19th century with 303 locations of owned land waqf (D. Ali, 1988, p. 78).

The practices and traditions of waqf has spread almost in the Indonesian archipelago. In Java, Waqf is practiced through the establishment of mosques and Islamic boarding schools, in other regions, such as Sumatra waqf practiced from the establishment of Surau in Minangkabau, in the hands of religious leaders, such as Sheikh Khatib, Sheikh Thaher Djalaludin, Sheikh Muhammad Djamil Djambek, Sheikh Ibrahim Musa, and Hajj Rasul, religious institutions; Surau and mosques were established. In addition, some waqf are used to develop religious schools, such as Thawalib, Parabek, and Diniyah (Azra, 2003, p. 49).

According to Hasanah (2007), waqf has been known for a long time, but it only received special attention around 2001, when it was formed by the Directorate of Zakat and Wakaf at the Ministry of Religion of the Republic of Indonesia. However, this does not mean that waqf was not taken care by the government. Even in the days of the Dutch East Indies government waqf had received attention. This is indicated by the existence of several regulations related to waqf, such as when the Religious Court (Pristerraad) was established (Stbl. Number 152 of 1882). One of the authorities of Religious Court (Pristerraad) is resolving the waqf problem. Therefore, in the period of the Dutch East Indies several regulations related to Waqf were implemented. These regulations include the Circular of the Secretary of the Governor of June 4, 1931 No. 125/3.

The principle of Waqf as part of the Islamic Philanthropy is believed to be one of the basic means of embodiment of mutual assistance (mu'awwanah) (Kencana, 2017). Furthermore, Quthb (1994) asserted that people are responsible for protecting the weak members and maintaining their needs. Muslim has to make war against those who disturb the weak. "... why do you not fight in the way of Allah and defend the weak men, women, and children ..." (Surah 4: 75).

According to Quthb (1994), the problem of ownership (in this case the management and regulation of waqf assets) is the problem closest to the core of the issue of 'Social Justice'. As formulated in the MPR Decree Number 11 / MPR / 1978 concerning the Guidelines for Comprehension and Implementation of the Indonesian philosophy (Pancasila), the fifth principle of the Pancasila is translated into 11 points of value, namely: 1) Developing actions; 2) Be fair; 3) Maintain a balance between rights and obligations; 4) Respecting the rights of

others; 5) Like giving help to others; 6) Avoid extortion towards others; 7) Not having a luxurious lifestyle; 8) Do not commit a harming acts to the public interest; 9) Like working hard; 10) Respect the work of others; 11) Do together to reach equitable and social justice.

Islam views toward the problem of 'ownership politics' based on its universal philosophy. Islam considers individual welfare and affirms social welfare, stands between individual interests and the interests of society without harming either party (J. Asshiddiqie, 2017, p. 222).

In the regulation of Islamic waqf, there is no literature found which makes Nazhir as one of the pillars of waqf, while the waqf law in Indonesia includes Nazhir in the element of waqf. In the needs of the continuing the use of a waqf object, a figure of a personal or group of Nazhir becomes the dominant figure.

The word Nazhir comes from the Arabic language, verb *nazhara-yanzhuru-nazharan*, which means keeping, maintaining, managing, and monitoring. Its subject is Nazhir means Supervisor, guardian, manager, and administrator. Another name Nazhir is manager of waqf property, which is called qayyim or nazhir or mutawalli (D. Ali, 1985).

In Islamic law, according to Manan (2006), although the jurists (fuqaha) do not include the nazhir as one of the pillars of waqf, because the jurists (fuqaha) argues that waqf is tabarru' (Sunnah worship). Even though the implementation of waqf is carried out anywhere. Nazhir's position is very important and central. Nazhir has the responsibility to maintain and develop waqf so that he waqf can function as expected (p. 269). Nazhir is in charge of distributing the results of the waqf and using it for the benefit of the community. Nazhir must able to manage and develop waqf productively and utilize the results using good management, besides that, he was able to collaborate internally with the Nazhirs themselves or with various parties, both at home and abroad who were concerned about the management and development of waqf (Faturohman, 2014).

Nazhir's existence is one of the uniqueness form of Islamic philanthropic fund management, namely waqf. It is like other Islamic philanthropic funds, such as zakat, grants, *infaq*, and alms. However, one principle principle that applies in waqf, is the permanence of sustainability, and its usefulness for a long time. As the provisions stated in Article 1 paragraph (5) of the Waqf Law, waqf property is property that has long-term durability and / or long-term benefits and has economic value according to sharia which is represented by Wakif. Furthermore, in the Waqf Law it is stipulated that Nazhir is a person and / or legal entity that is assigned the task of maintaining and managing waqf property.

Regulation number 41, 2004 categorized Nazhir into two groups, namely individual Nazhir and Institutionalized Nazhir. An individual Nazhir needs to adhere to the following requirements:

- a. Indonesian
- b. Muslim
- c. adult
- d. capable physically and spiritually
- e. are not prevented from carrying out legal actions.
- f. resident in an area where Waqf is located.

For an institutional *Nāzir*, the requirements are:

- a. a legal Indonesian firm and located in Indonesia
- b. a representative in a district where the location of land (*waqf*) is located
- c. every *Nāzir* is obliged to register and legalized to the Religious Affairs Office
- d. the number of *Nāzir* in every district is determined by the Minister of Religious Affairs.

Although the number of waqf assets that affect the economy is managed by *mutawalli*. On the other hand, it does not always have commitments in accordance with the purpose of waqf asset allocation, pragmatic tendencies in the management of waqf is found. Corruption tends to happen on this kind of Waqf mangement, because the manager has personal importance (Kuran, 2001).

One example is the constraint in the management of waqf assets in the Philippines, which explains the reasons for the lack of maximum management of waqf assets, as follows (D. Gamon & Tagoranao, 2018, p. 1210):

1. Most of Muslims in Philipines do not understand the meaning and impotence of waqf;
2. Some trustees or *mutawalli* abused or mismanaged the waqf properties and used it for their own benefit;
3. Waqf properties could not be developed because of lack of capital from *halal* sources;
4. Lack of interest from the ‘*Ulama*’ in promoting the teaching of Islam Relating to the advantages of waqf system;
5. Lack of support from private and goverment institutions;
6. Only few rich muslims are around, who are willing to give some part of their wealth for waqf purposes.

This paper analyzes the management of waqf assets in Indonesia which refers to the waqf Regulation, namely appointing two nazhir institutions that act as managers, Nazhir Individuals, and/or by Nazhir Organizations/Legal Entities. This article examines the Legal Entity Nazhir Regulation in Law Number 41 of 2004 concerning waqf from the perspective of applying the concept of *maslahah* in Islamic Law. The object studies of this paper is the establishment of Nazhir Institutions/Legal Entities in Law Number 41/2004 concerning waqf.

Literature Review

Rules of Maqashid Syariah

According to Al-Syatibi (1996) the purpose of the benefits contained in *Maqashid Syariah* includes 5 (five) main things, namely protection of aqeedah / religion, protection of self / soul, protection of mind and reason, protection of offspring, protection of self-respect, and protection of property. *Maslahah* is divided into three parts, namely *darûriyyât*, *hâjiyyât* and *tahsîniyyât*. *darûriyyât* is able to guarantee the existence of each of the five main things of *Maqashid Syariah*. Something that is able to provide convenience and support for guaranted the existence of each of the five main things is *maslahah* at the level of the *hâjiyyât*. Something that is able to give beauty, perfection, optimism for guaranted the existence of each of the five main things is *maslahah* at the level of *tahsîniyyât* (Asmawi, 2014).

Islamic Shari'a is intended to provide goodness, prosperity, and benefit for all humanity. *Maqashid Syariah* aims to keep the importance and needs of human beings in the world and

the hereafter. While Maqashid Syariah contained the secrets that have been set by Allah SWT. Every law that has been prescribed aimed at achieving happiness in individuals and society and maintaining the law. Furthermore it aims for prosperity of the world to achieve highest perfection, kindness civilization. This article also explains, that Al Syatibi (1996) in his book '*al Muwafaqat fi Usul al Shariah*' affirms beside maintaining human interests in world, *Maqashid sharia* also aims to preserve human interests after death (N. Muhammad et al., 2015, p. 4).

Furthermore, N. Muhammad et al. (et al., 2015) stated that the recommendations for the implementation of waqf in Islam not only had the dimension of worship, but also had a considerable contribution in the aspect of improving and sustaining the economic of mankind. So that the waqf should be used as an instrument for the development of the life of Muslims from all aspects. Economic, social, educational and other aspects. History has proven that the triumph of waqf institutions in Islamic countries in the Middle East is caused by the existence of a spirit of waqf (p. 7).

All Sharia objectives, as shown in Figure 1 below, it must be analyzed individually and collectively, as the relationship between each value and the others is causal and interrelated, because the benefits of these values interrelated with each other. In other words, people can focus on individual religious values. But when a Muslim achieves such values perfectly or in part, his achievements will affect the achievement of the other four values proportionally. This relationship is real, because it will affect the inner self, and also someone's motivation and dedication to the achievement of other values. In contrast, all values (eg, rational thinking, safe living, protected human intelligence, sustainable generations of Muslims, and access to wealth) will influence religious protection (H. Mohammad: 2018; pp. 1065-1091).

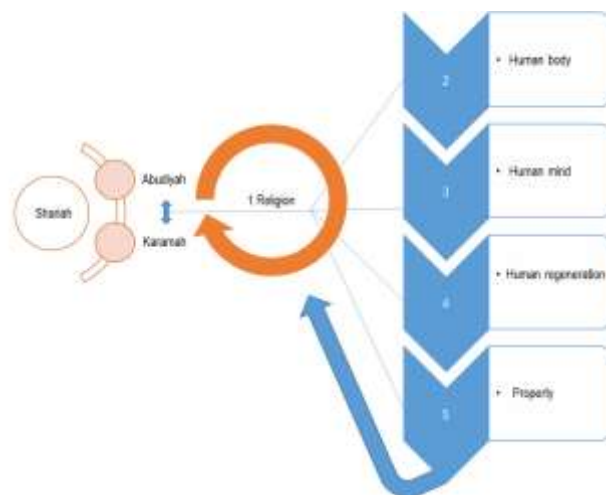


Figure 1: *Maqashid al-Shariah* (H. Mohammad, 2018)

According to H. Mohammad (2018), by taking several opinions of Islamic jurists, stating that Sharī ah protects five basic human interests. Al Shatibi (d. 790 AH) argues that protection includes positive actions and prevention of threats to the existence of five human interests (Raqib, 2015). Ibn Ashur (1978) asserts that the purpose of Sharī‘ah is to attract human benefit and prevent crime. In this case, according to Rahhal and Sa'd (2013), waqf is for the protection of benefits for humans. However, if we take all three categories of benefits as the main goal, Waqf can contribute both to the attractiveness of benefits and prevention of crime, all for the benefit of humans. These ideas are: 1) Protection of religion (al-din), 2) Protection

of human persons (al nafs), 3) protection of the human mind (al 'aql), 4) protection of the human race (al nasl), 5) protection of individual property (al mal) (p. 1070).

One of the five objectives of Maqashid Syariah is to maintain property, which is identically deals with matters of social problems. Where Islam sided with the interests of the human and made the need as a benchmark of power. Islam had a target to avoid all dangers and people - in the face of a small number of rich people who twisted and limited among them, because the concentration of assets among the rich only could damage the fields of matter, mind, world, and religion. Islam establishes and makes samples about this, along with advice and lessons on human experience throughout its history. Furthermore, it argues that wealth must be distributed according to needs, so that the wealth of rich people will not increase, and property does not become their persecutors, where they always circulate around it. (Jauhar, 2017, p. 178).

"Any of the spoils that Allah gave to His Messenger (from property) that came from the inhabitants of the cities were for Allah and the Messenger, relatives, orphans, poor people and people on the way so that the wealth should not be circulated among the rich among you. What the Apostle gives you, accept it. Leave what he forbids. And fear Allah. Indeed, Allah is very hard in his punishment." (QS. Al-Hasyr (59): 7).

Why Nazhir Institution is Needed to Manage Waqf Assets?

According to Rozalinda (2015) the issues concerning who will carry out maintenance, management, and management of waqf assets which in fiqh terms are known as *nazhir* or *mutawalli* are very crucial. That happened because waqf assets were the mandate of Allah in the hands of Nazhir. Every Nazhir activity must be taken into consideration for the continuity of waqf assets so that the benefits can be distributed to *mauquf 'alaih*. The benefits to be enjoyed by waqif are very dependent on Nazhir because in the hands of nazhir waqf wealth can be guaranteed its continuity (p. 40).

Accountability is one of the basic considerations of the noble institution of Waqf. Mutawallis must be responsible and accountable in discharging their responsibilities (Husain & Rashid, 1979). The contractual relation between the endower and the mutawalli is a relationship based on trust, whereby the mutawalli has to manage and act on behalf of the endower. As a trustee, it's mutawalli's responsibility to report to the waqf endower and beneficiaries how the waqf endowment are fully used to generate the revenue for the beneficiaries. The mutawallis should keep account of every penny and submit statements of income and expenditure every year to the waqf board. (Aziz & Ali, 2018, p. 1240)

As the provisions contained in Article 1 paragraph (4) of Law Number 41 of 2004 Nazhir is a party that receives waqf property from wakif to be managed and developed in accordance with its designation. Which includes (1) Individual Nazhir ; (2) Organization Nazhir; (3) Legal Entity.

As for Article 215 paragraph (5) Compilation of Islamic Law defines Nazhir as a group of people or legal entities entrusted with the task of maintenance and manage waqf objects. In the Government Regulation Number 28 of 1977 concerning the Land Ownership Representative stated Nazhir, is a group of people or legal entities entrusted with the task of maintenance and managing waqf objects.

Based on the provisions in Article 9 of Law Number 41 of 2004 concerning Waqf states that Nazhir includes: (1) Individuals, (2) Organizations, and (3) Legal Entities. The requirements of Individuals Nazhir are regulated in Article 10 paragraph (1) of Law Number 41 of 2004, namely (1) Indonesian Citizens, (2) Muslims, (3) adults, (4) trustees, (5) capable physically and spiritually, and (6) are not prevented from carrying out legal actions.

The requirements of the Organizations Nazhir are regulated in Article 10 paragraph (2) of Law Number 41 of 2004, namely (1) the management of the organization fulfills the requirements of individual nazhir, and (2) organizations that operate in the social, educational, social and / or religious fields. The requirements of the Legal Entity Nazir are (1) the management of the legal entity concerned fulfills the requirements of the individual legal entity, (2) an Indonesian legal entity established in accordance with the prevailing laws and regulations, and (3) the legal entity concerned is engaged in social, educational, social, and / or religious of Islam.

Whereas in relation to the resource of managing waqf assets referred in this discussion is Nazhir waqf. As the provisions stated in Article 10 of Law Number 41 of 2004 concerning Waqf affirm that:

- (1) Individuals as referred to in article 9 letter a can only become Nazhir if they fulfill the following requirements:
 - a. Indonesian;
 - b. Muslim;
 - c. Mature;
 - d. Trustees
 - e. Capable physically and spiritually;
 - f. are not prevented from carrying out legal actions.
- (2) The organization as mentioned in article 9 letter b can only become Nazhir if it meets the following requirements:
 - a. The management of the pointed organization fulfills the requirements for individual Nazhir as referred in paragraph (1);
 - b. Organizations engaged in the social, educational, social and / or religious fields of Islam.
- (3) Legal entities as referred to in article 9 letter c can only become Nazhir if they meet the following requirements:
 - a. The management of the legal entity concerned fulfills the requirements of the individual nazhir as referred to in paragraph (1); and
 - b. Indonesian legal entities formed in accordance with applicable laws and regulations; and
 - c. The legal entity concerned, and / or Islamic religion.

As stated in Article 13 paragraph (1) and paragraph (2) of PP No. 42/2006 on the Implementation of the waqf Law, generally the duty of nazhir is formulated as follows:

- 1) Nazhir is obliged to administer, manage, develop, supervise and protect waqf property;
- 2) Nazhir shall make periodic reports to the Minister and BWI regarding the welfare of the warden as referred to in paragraph (1).

The formulation of Law Number 41 of 2004 concerning Waqf confirms the ideal professional Nazhir as the manager of waqf assets, so that it fits the expertise and mandate carried out by the Nazhir's and / or groups. This is in line with the Prophet's Hadith, which means:

"When the trust is no longer held firmly, then wait for the devastation, Abu Hurairah asks, how does the person who does not hold the trust be Allah's Messenger? The Apostle replied: When a matter is handed over to the non-members then wait for destruction (Al Bukhari, No. 6131). "

One of the results of a study conducted by the Indonesian Waqf Board of Research and Development Team, published in 2016, concluded that there were four types of Waqf Institutions classified by level of productivity, potential for Nazhir and assets in each waqf land, namely: (1) Waqf with large assets and high potential Nazhir; (2) Waqf with large assets with sufficient potential Nazhir; (3) waqf with small assets and high potential Nazhir ; and (4) small assets and low potential Nazhir (Badan Wakaf Indonesia, 2016, p. 15). The research results of the Indonesian Waqf Board Research and Development Team show that, Up to now productivity of waqf assets is very likely to be realized when these assets are managed and regulated by a Nazhir under the Organizations, Foundations, and / or Legal Entities. As explained in Table 1 below:

Table 1. List of Names of Foundations, Organizations, or Legal Entities that manage a number of Waqf Assets for the DKI Jakarta Province (p. 15-25)

	Allocation of Waqf Assets	Area of Assets (large/sma ll)	Nazhir status	Potency of Nazhir (Excellent/Go od/fair/poor)
1	Darul Azkar Foundation: worship facility (Mosque), Educational facilities, and Meeting Hall	8.000 m ² (large)	Foundation	Excellent
2	Husnayain Foundation; Abu Bakar Ash-Shidiq Mosque, Business Unit: Clinic, hospital, Drudstore, cafe, mini market, rented parking lots.	6.524 m ² (large)	Foundation	Excellent
3	Kramat Payungan Hidayatullah Foundation: educational facilities (Play Group).	1.000 m ² (large)	Foundation	Good
4	Wakaf Mesjid Al Barkah Foundation; worship facilities and parking lots.	5.000 m ² (large)	Foundation	Good
5	Mesjid Al-Birru Foundation; worship facilities, a part of area is rented for middle-low business.	2.166 m ² (large)	Foundation	Good
6	Wakaf Mesjid Baiturrahman Foundation:	1.600 m ² (small)	Foundation	Excellent
7	Nur Assailina Foundation	2.500 m ² (large)	Foundation	Excellent
8	Wakaf Mesjid Al-Abrar Foundation	2.100 m ² (small)	Foundation	Excellent
9	Wakaf Mesjid Darussalam Al-Amin Foundation: worship facilities, Educational facilities, and rented parking lots.	1.000 m ² (small)	Foundation	Poor

10	Mesjid Al-Muflihun Foundation: worship facilities, <i>Majlis Taklim</i> , and educational facilities (TPA).	4.000 m ² (large)	Foundation	Poor
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*Data obtained and reprocessed by the author from Indonesian Waqf Board Book: *Fenomena Wakaf di Indonesia*, 2016.

The availability and commitment of the government allocates facilities, infrastructure, and other resources as well as the budget for social service efforts, and improving the quality of life of the community. One of the concrete manifestations of this fifth point, contained in the formulation of Article 12 of Law Number 41 of 2004 stipulates that Nazhir (a person or legal entity responsible for property granted as a waqf) can obtain no more than 10% of net income from managing and developing waqf objects. This remuneration comes as a result of Nazhir's responsibility in managing waqf. The concept of remuneration has the potential to reflect financial material in waqf. If land waqf can also be used to gain profits where a Nazir has a share, this can be seen as a commercial interest (Sihombing, 2016).

Methodology

Based on the problem of the study, the method used is qualitative approach. This research conducted literature reserach to study secondary data related to manajerial waqf assets by the Legal Entity of Nazhir in Indonesian Waqf regulation and it seen from the concept of *Maslahah* in Islamic Law (*syariah*).

The Relationship between *Maslahah* and *Nazhir* in Waqf Regulation

The purpose of the synthesis is to explain the extent of *awqāf*'s (sing. *waqf*) role in the achievement of Shari'ah, and purpose of a *waqf* donation. Hence any donation in the form of *waqf* has to be used for its objectives. In other words, the objectives of Shari'ah may provide a guide to a philanthropist in defining the cause, object protection of the objectives of Shari'ah, regardless of whether these objectives are textual or otherwise, i.e., accepted human benefits (*maṣlahah al mu'tabarh*) or unrestricted ones (*maṣlahah mursalah*) (H. Mohammad, 2018).

Islām has protected five fundamental human rights: religion, person, mind and its faculties, lineage, and property. These five fundamental interests of humans are protected in various ways including the use of the property. *Waqf* is one of such tools, which requires donors to be selfless and offer it to many in their time and after that. The five values are considered to be the objectives of *waqf* for the *waqif* and the activities in which the *nāzir* can invest *waqf* assets (H. Mohammad, 2018).

As Manan (2006) argues, that waqf worship has divine "Ilahiyah" (God Dimension) and "insaniyah" (human dimensions), it means that in its implementation the responsibility of the world and the hereafter. As well as the new paradigm contained in Law No. 41 of 2004 concerning Waqf which requires a good form of waqf assets management, a transparency by taking responsibility both to Allah SWT, institutional, social, and accountability in the law.

The accountability of waqf asset management is likely the same as the accountability of charity institutions (Hyndman & McDonnell, 2009) which describes the relationship of donors, governments and beneficiaries. Charities are obtained from both government and private donors. The charitable institutions must be responsible for the charities given according to the agreement with the donors. The donors gain benefits from the good effects due to observance of the regulations, while the regulator gives to the charity institutions the legality for the operation, supervision and tax exemptions. The institution provides benefits to

the community, even though they have no direct obligation to the community (Tumirin et al., 2017, p. 10).

The social assumption of the waqf asset is the asset that would be useful for the community in general, such as to build a house of worships (mosque), schools, orphanages, hospitals, maternity clinics, libraries, and others; those places are intended for social purposes. As long as the waqf assets are managed to give good benefits for the community, then the donors will get rewards from God (Tumirin et al., 2017, p. 14).

Nazhir Principal Duties under Article 11 of Law Number 41 Year 2004:

1. Conducting administration of waqf property;
2. Managing and developing waqf property in accordance with its objectives, functions, and designations;
3. Supervising and protect waqf property;
4. Reporting the implementation of duties to BWI

The concept of Social Justice according to Quthb (1994) in his book entitled 'al-is al-Jam'iyyah fi al-Islam (Social Justice in Islam), is influenced by the basic Islamic thought of life and the universe that is in universal purpose. Islam's view of human life has made this social justice a humanitarian justice that does not cease on material and economic issues. Islam demonstrates a holistic view and aims to realize the ideals of humanity that Quthb says is a matter that can include economic, political, and other social issues (p. 24).

In the perspective of Islamic Law, the law does not just apply to the dogma and norms. Even in some of the rules that the regulation has been firmed (*Qath'ie ad dalalah*) and sourced from the Sharia (Quran and Hadith), the rules are not immediately enforced. As noted in the history of the formation and development of Islamic Law, at Caliph Umar bin Khattab era, he did not apply hand-held sanctions for the perpetrators of the theft, whereas the text of the Quran QS. Al Maidah verse 38 has clearly mentioned "the man who stole and the woman who stole, cut off their hands as a retribution for what they did and as punishment from Allah, and Allah is Mighty, Wise. Umar's verdict is against the Quran, and is reinforced by the Sunnah Fi'liyyah (Hadist Fi'liyyah) where the Messenger of Allah. practicing law of hand cuts for thieves at that time. Umar's consideration by not applying this type of punishment is due to current state of the society to prevent the imposition of penalties. For Caliph Umar ra. the most fundamental thing is how the spirit and spirit of upholding religious teachings can be applied for the benefit of the people which size will never be the same in every space and time.

Islamic law viewed at all human laws linked to the motivation that motivates the perpetrator in doing something with intentions. When in this world everything is based on reality, physical act, then in the hereafter all the practice is based on the intention contained in the heart of the perpetrator. That is the basis of receiving good or bad rewards. This is the perfect state of laws which will bring the ultimate improvement and give the results in the improvement of the soul, so all the practices of human beings are built on the basis of justice and truth. Perfect laws place humans under two supervision: (a) fearing God and being conscious of His calling; (b) Fear of law (H. Ash-Shiddieqy, 2013, p. 81).

According to 'Izz ad-Din bin Abdul Salam, Quoted by Manan (2006) the *maslahah* and *mafsadah* are often meant good and bad, benefit and harmful, good and ugly, useful and good, because all *maslahah* is good. While *mafsadah* is all bad , harmful and bad for humans.

In the Qur'an the word *al-hasanat* (goodness) is often used for the understanding of *al-masalih* (kindness), and the word *al-sayyi'at* (disadvantage) is used for the understanding of *al-mafasid* (damages). In another section 'Izz Din said that there are four kinds of *maslahah*, namely the delicacy, the reason or the means, the pleasure, the reasons and its the means, while the *mafsadah* also have four kinds, namely pain or badness, the causes and its reasons (H. Ash-Shiddieqy, 2013, p.24).

Al Ghazali explains that *maslahah* literally means something that useful, bring benefits and avoids harmfulness (damages) which is essentially maintaining the purpose of *syara'* in establishing the law. It is meant that *maslahat* is something that is not indicated by certain arguments that justify or abrogate it and it is in line with the act of *syara'* and the purpose of the law of *syara'* (*maqashid shariah*), is maintaining the religion (*hifzu addin*), nurturing the soul (*hifzu annafs*) maintaining the property (*hifzu al maal*), nurturing the offspring (*hifzu an-nasl*), and maintaining the honor (*hifzu an-nasab*) (D. Ali, 2000, p.54).

Furthermore, Al-Ghazali made the *maslahah* operational limit to be accepted as a basis for the determination of Islamic law, as follows (Mas'ud, 1977, p. 149):

- 1) *Maslahah should be in line with the purpose of setting up Islamic law, namely maintaining the soul, religion, ancestry, wealth, and honor.*
- 2) *Maslahah should not contradict the Qur'an, as-sunnah, and ijma' (consensus or agreement) Maslahah occupies a level daruriyat (primary) or hajjiyyah (secondary) equivalent to daruriyah.*
- 3) *The benefit must be qath'iyya (clear legal) or dzanny (doubting the law) that approaches the qath'iy.*
- 4) certain cases required requirements, must be qath'iyyah, daruriyyah, and kulliyah.

In the practice of administering and managing waqf property, Islam outlines that the community, especially Muslims, must have experience and capacity so that the ummah is able to fulfill their needs. Hence it leads to the realization of personal economic independence and economic manner as a whole. Because according to Al-Qaradawi (1994) without economic independence, then Muslims will not have *izzah* (power or self-esteem). So that it will continue to depend on other nations (p. 221).

Despite the perspective of society in general, that waqf assets in the form of land are only sufficiently built for mosques and / or musholla or other educational institutions. So, the professionalism and productive thinking of a Nazir is urgently needed. If possible Nazhir can use the extensive and untapped land waqf asset for other interests needed by the community, and bring value economically and sustainably. So, Nazhir who thinks productively and applies modern management of waqf assets, can be assumed to realize a real contribution from one waqf asset in ensuring the sustainability of the social interests of the community.

Conclusion

Classical fiqh, including fiqh applies the waqf, it is subject to constant reconsideration and appropriate reformation to meet contemporary needs. One such area of reform that should be studied and considered more carefully is the adoption of those legal and equitable concepts in trusted law that have encouraged the flexibility and widespread popularity of the trust (White, 2006).

Discussing Islamic Law, one can not escape from the term the *Maqashid Shariah*. Talking of *sharia maqashid*, then one can not escape from the Islamic Law Philosophy. The philosophy

of Islamic Law is very much synonymous with the wisdom contained in the command, the advice or the prohibition of a law. According to H. Ash-Shiddieqy (2013) when Islamic philosophers use the word *hikmah* (wisdom) as a *muradif* for the philosophy, then the fuqaha, as well as the compiler of *asy-shari'ah* book uses the word *hikmah* (wisdom) as the name of *asrar al-ahkam* (legal secrets).

The purpose of Islamic law is merely to realize the benefits of society, both in the world and in the hereafter, it also deny the harm (*Mudharat*) and damage (*Mafasid*), and to realize absolute justice. Both to the law enshrined in *nash*, or the law which is the result of *ijtihad*. The establishment of the *Nazir Waqf* institution in the Law of Indonesian Waqf is a manifestation of the clarification to provisions in the shariah (*nash* Al-Quran and al-Hadiths) globally (*mujmal*). So the formulation of *Nazhir* institution is a form of 'Islamic jurisprudence' (*fiqh*) as a result of the understanding of 'Islamic law' (*syariah*).

Legal policies for the establishment of Legal Entity of personal Nazhir in Indonesia show a spirit of Muslim society and the government towards the tangible manifestation of the contribution of the waqf Institution to the country's development, namely, the Accountable and Professional Nazhir in creating continuity and prosperity for the people, nation, and country of Indonesia. The accountability aspect, as a consequence of accountability to the public, can be fulfilled by institutional/ Legal Entity Nazhir. Furthermore, the legal policy of the establishment of the Nazhir institutional /Legal Entity is directly proportional to the values referred in *Maqashid Syariah*, namely maintaining religion, soul, reason, offspring, and property. As Al Ghazali asserted in his book "al Mustashfa min" *Ilm al-Ushul* "that all efforts made in order to maintain the existence of the five cases are categorized as *maslahat* (benefit), and things that can damage the existence of the five things are categorized as a *mafsadat* (damage).

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